United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-4049

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-4049, 4061, 4074

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
AND WESTERN UNION INTERNATIONAL, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA
Respondents,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
XEROX CORPORATION
HAWAIIAN TELEPHONE COMPANY
AMERICAN PETROLEUM INSTITUTE,
Intervenors.

PETITION FOR REVIEW OF A REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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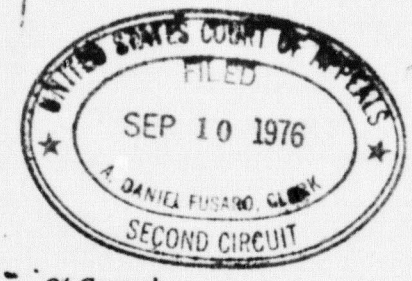
p/s

BRIEF OF INTERVENOR AMERICAN TELEPHONE AND TELEGRAPH COMPANY



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Dated: September 10, 1976

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PRELIMINARY STATEMENT

On January 19, 1976, the Federal Communications Commission (the "Commission") released an order[1] wherein it con-

[1] 57 F.C.C. 2d 705 (1972).

cluded that it was in the public interest to broaden the ways in which telephone customers may send messages to overseas points. It found that it was no longer in the public interest to restrict customers making overseas telephone calls from sending data messages on those calls. Accordingly, the Commission directed the Chief of its Common Carrier Bureau to accept applications from American Telephone and Telegraph Company (AT&T) for authority under Section 214 of the Communications Act of 1934, as amended, (the "Communications Act") to allow customers to use AT&T's overseas telephone service to send so-called DATAPHONE[2] messages overseas. This is all the Commission has decided relevant to this appeal.

On February 9, 1976, ITT World Communications Inc. (ITT) filed a petition to review with this Court claiming that the Commission's decision was arbitrary and capricious, unsupported by substantial evidence and had failed to give sufficient weight to the anti-competitive effects of its decision. On February 23, 1976, RCA Global Communications, Inc. (RCA) filed a similar petition and, on March 16, 1976, Western Union International, Inc. (WUI) did likewise. On March 8, 1976, AT&T petitioned to intervene in the ITT and RCA proceedings. The Court granted these petitions.[3] Subsequently, this Court consolidated the three proceedings.[4]

ISSUES PRESENTED

This case raises the fundamental question whether telephone users may use their ordinary telephone service in the same way when they place an overseas call as they do when they place a call within the continental United States. In particular, can they

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[2] "DATAPHONE" is a Registered Service Mark of the AT&T Co.

[3] Order dated March 12, 1976.

[4] Orders dated March 10, 1976, March 26, 1976.

transmit data on these calls or may they only transmit voice messages. The Commission has found that it would be "privately beneficial without being publicly detrimental" and, thus, in the public interest, to permit telephone customers to use their telephone service in this manner. AT&T submits that the Commission's conclusion, reached after careful consideration of the issues, is amply supported by the record before the Commission and should not be overturned.

The ITT, RCA and WUI petitions challenge the Commission's determination on the following grounds:

> (1) The Commission's determination is arbitrary and capricious and unsupported by substantial evidence.
>
> (2) The Commission's decision represents a departure from past policies and the Commission has not adequately explained its reasons for departing from those policies.
>
> (3) The Commission has not used reasonable procedures for dealing with the "competitive issues" raised by the Petitioners.

Significantly, the Petitioners' Briefs do not challenge the Commission's basic public interest determination that telephone customers should be permitted to transmit data on their overseas telephone calls.

AT&T's Brief will address each of the issues raised by the Petitioners.

STATEMENT OF THE CASE

A. The Parties

In this proceeding, ITT, RCA and WUI join forces to overturn the Commission's determination to remove restrictions on the use of overseas telephone service. Collectively, these Com-

panies are referred to as the international record carriers (IRCs) because of the nature of the services they sell.[5]

The IRCs are "international" carriers since they provide services only between the United States Mainland and international or offshore domestic locations[6] and they are "record" carriers since they predominantly transmit communications in written—as contrasted to voice—form.

B. Narrow Band and Broad Band Transmission

To explain the services the IRCs provide, it would be useful to define some terms; in particular, "telegraph grade" and "voice grade" circuits. All carriers—both the telephone companies and the IRCs—transmit their communications via wire, cable or radio. All transmission techniques require the use of some electrical bandwidth to do the job. As the name suggests, a voice grade channel is a channel which employs sufficient bandwidth to transmit the human voice with reasonable clarity. Conventionally, this has employed a bandwidth of 4,000 cycles per second (Hertz) or 4.0 kiloHertz (kHz).[7]

On the other hand, a telegraph grade channel requires considerably less bandwidth, in some cases as little as 50 cycles per

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[5] ITT, RCA and WUI are the "Big Three" international record carriers. The coterie of IRCs also includes TRT Telecommunications, Inc. and French Cables, Inc., which have not joined in this appeal.

[6] The offshore domestic locations are Hawaii, Puerto Rico and the Virgin Islands. Historically, these locations have been treated, for various purposes, as "international" or "overseas" locations. Communications Act, Section 222(a)(5), (6) and (10), 47 U.S.C.A. § 222(a)(5), (6) and (10).

[7] In recent years, the telecommunications industry has moved away from the term "cycles per second" and substituted the term "Hertz" in honor of Heinrich Hertz, a pioneer in the study of radio wave propagation. "Hertz" is abbreviated as "Hz".

second. Telegraph transmission using "narrow bands" is often described in terms of "bauds".[8] Narrow band telegraph transmission is not suitable for voice transmission. (A-248)

Transmission may also use circuits broader than voice grade such as 9.6 kHz or 50 kHz. If voice grade or broader-than-voice grade channels are employed, it may be possible to transmit voice and data on the same channel—alternately or simultaneously. When circuits are used for data, the carriers customarily describe transmission capabilities in terms of "bits per second" (or simply "bits") instead of "Hertz".[9] Thus, a voice grade channel used for data would normally accommodate 4.8 kilobits (kb) of data.[10]

Thus, the carriers engage in "narrow band" telegraph grade transmission (50-150 baud), voice grade transmission (4.0 kHz) and broadband transmission (50 kb) and many classes of service in between.

C. The International Record Carriers

With this in mind, let us identify four classes of service provided by the IRCs:[11]

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[8] "Bauds" refers to the number of signal elements which can be transmitted per second.

[9] "Bit" means "binary digit", a unit of data.

[10] With proper transmission controls, a voice-grade channel may handle more than 4.8 kb.

[11] These paragraphs describe *typical* methods of using the telecommunications services of the IRCs. There are numerous variations in the way service is provided depending on whether the IRC's customer is located in a "gateway" city or in the "hinterland", whether the customer obtains a private line channel into the IRC's gateway office or whether the customer accesses the IRC gateway office over the facilities of the Western Union Telegraph Company, the telephone companies or some other domestic common carrier.

(1) Message telegraph service. Let us assume a customer wishes to send a telegram to London. Typically, he would phone Western Union Telegraph Company, the local telegraph company (not to be confused with WUI), Western Union Telegraph Company would send the message over its facilities to an IRC, e.g,. ITT's office in New York, and ITT would retransmit the message to its correspondent in the United Kingdom (U.K.). The correspondent would reverse the process to deliver the message in the written form to the addressee.

(2) Telex service. Here, the customer accesses Western Union's domestic telex or TWX (teletypewriter exchange) facilities. The customer uses a teletypewriter to prepare his message. This produces a paper or magnetic tape. The tape is fed into a transmitter which is directly connected to a teletypewriter at the called telex station in the U.K.—via Western Union's domestic telex (or TWX) facilities to the IRC's gateway office, thence via the IRC's overseas facilities and the overseas and domestic facilities of the IRC's foreign correspondent. The addressee receives his message on a teletypewriter. (A-1)

(3) Leased line (private line) services. Here, the IRC provides a dedicated facility to the customer between the IRC's office and the office of its foreign correspondent. The customer will lease a private line service from Western Union or AT&T between his premises and the IRC's office. The foreign correspondent arranges for leased lines between its office and the customer's premises abroad.

Until 1964, the IRCs offered only telegraph grade leased line services. In 1964, the IRCs commenced offering a form of leased line service called "alternate voice data" or AVD service. This service used voice grade facilities and, as the name suggests, could be used alternately for voice or data transmission.

(4) DATEL service. In recent years, the IRCs have commenced to offer a DATEL service. Generally, this is the same as telex service except that it affords broader band circuits (1.2-2.4 kb). (A-1, 104-05)

The IRCs charge for message telegrams, telex and DATEL service on a "usage" basis, that is, the charge varies with the length of the message or the time their facilities are used. They charge for leased lines on a monthly basis.

D. The Telephone Companies

In the continental United States, telephone service is provided by 24 Bell System Companies (of which AT&T is one) and some 1,600 independent telephone companies. In general, these companies provide the full spectrum of telecommunications services, including:

(1) Local telephone service. This is "plain old telephone service" where the customer dials his neighbor, is connected and carries on a telephone conversation.

(2) Message Telecommunications Service (MTS). This is where the customer dials someone in another community (or calls through an operator) and carries on a telephone conversation. MTS may be "intrastate" where the customer calls another community in the same state, "interstate" where the customer calls a community in another state, or "international" where the customer calls a community in another country. (A-143-44)

(3) Wide Area Telecommunications Service (WATS). Here the telephone company provides the customer with a WATS access line, which the customer can use to make or receive calls via the MTS network to specified areas for a specified monthly charge. Currently, WATS service is available only on a "intra-

state" or "interstate" basis within the continental United States; the telephone companies do not offer WATS service to international or offshore domestic locations.[12]

(4) Private Line Service. Here, the telephone company provides the customer with a full time channel service. For many years, the telephone companies have provided telegraph grade, voice grade and broadband private line channels for voice and non voice use. It has also permitted customers to use voice grade private line channels for data transmission or for "alternate voice data" (AVD) use although that term is not typically applied to domestic circuits.

The telephone companies provide local, intrastate, interstate and international private line service. The telephone companies were the first carriers to offer private line voice-grade service overseas, following installation of the first transatlantic telephone (TAT-1) cable. Moreover, the telephone companies offered alternate and simultaneous voice and non voice service well before the IRCs first offered it, using the TAT-1, TAT-2 and TAT-3 cables.[13] In the *HAW-1* proceeding,[14] over the objection of the IRCs, the Commission authorized AT&T to provide AVD services to Hawaii.

The telephone companies charge for local telephone service and MTS on a per message and per minute (usage) basis. (A-1)

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[12] Under a Commission Order released July 20, 1976, the Telephone Companies are required to offer WATS service to offshore domestic locations in January 1977. Integration of Rates and Services, F.C.C. 76-665, released July 20, 1976; WATS Order, 59 F.C.C. 2d 671 (1976).

[13] AT&T (TAT-4), 37 F.C.C. 1151 (1964) at 1152, 1158. As the name suggests, "TAT-4" is an acronym for the fourth Trans-Atlantic Telephone cable.

[14] AT&T (HAW-1), F.C.C. 55-915, adopted September 7, 1955; reconsideration denied 44 F.C.C. 602 (1955). "HAW-1" is an acronym referring to the first U.S. Mainland/Hawaii cable.

They charge for WATS on a monthly measured time basis. They charge monthly rates for private line services.

Sometimes, local telephone service, MTS and WATS are referred to as the telephone companies' "monopoly" services and private line service is referred to as a "competitive" service.

E. Dataphone Use

By 1958, telephone company customers were showing an increased interest in using local telephone service and MTS for transmitting data. To illustrate this data requirement, the customer might have a device which would optically scan a printed page, then translate that information into audible tones which could be transmitted on an ordinary telephone circuit. Typically, the customer would place an ordinary telephone call to the desired party, tell the called party he was planning to send a data message, then place the telephone handset in a cradle included in the device and turn the device on. At the other end, the called party would go through a similar procedure. When the transmission was completed, the calling party would ask whether the printed page had been received and, when assured that it had been, both parties would hang up. The calling party would pay the telephone company's charge for an ordinary MTS call.[15]

Several points are noteworthy. First, the telephone company did absolutely nothing to its telephone instrument or the telephone network to make this transmission work. (A-145, 318) The customer took the telephone facilities and network "as is" and, through his ingenuity and resourcefulness, found a way to

[15] In addition to the "acoustical" connection described in this paragraph, the telephone companies also permit direct electrical connection to customer-provided data equipment via a data set.

use it to greater advantage. The Commission has found this use "privately beneficial without being publicly detrimental". (A-6).

Second, the telephone company had absolutely no way of knowing whether the customer was using service in this manner. (A-151, 317-18) Thus, customers may be transmitting data telephone calls on their local service or on intrastate, interstate and international MTS. The telephone companies have no way of knowing that this is happening.

The telephone companies offer their services under various interstate and intrastate tariffs. They offer their interstate services under tariffs filed by AT&T, on behalf of virtually all domestic telephone companies, and, in particular, they offer their interstate and international MTS under AT&T's Tariff F.C.C. No. 263 (formerly Tariff F.C.C. No. 132).

In 1958, the telephone companies sensed a demand was emerging for the use of MTS for data purposes. Tariff F.C.C. No. 132 contained numerous terms and conditions defining AT&T's services and in some cases limiting their use. To meet this demand for data transmission, AT&T decided to clarify its tariff in a way that did two things: first, it assured the customer that the tariff did not otherwise prohibit the use of MTS for the foregoing types of data use and, second, it warned the customer that the telephone companies would do nothing to make the MTS network suitable or appropriate for data transmission.[16]

Anticipating the furor that the IRCs might raise—an expectation that was not disappointed—the telephone companies

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[16] AT&T Tariff F.C.C. No. 132, 5th Revised Page 10C. See also 6th Revised Page 10C, 5th Revised Page 10CA. For current tariff provision, see AT&T Tariff F.C.C. No. 263, Sections 2.6.4; 2.6.6.

confined their assurance that the tariffs permitted data use to calls within the United States Mainland (and later to Canada, Alaska and Hawaii). (A-1, 144, 156-57, 317) This assured that most customers could promptly avail themselves of the permitted data use of MTS without awaiting the outcome of the expected controversy with the IRCs. Since 1958, customers have used local and intrastate and interstate MTS for data purposes. AT&T submits that this use has served the public interest.

F. The Commission's Determination

By expressly stating that this data use of MTS was permitted within the contiguous 48 states (plus Alaska, Hawaii and Canada), the telephone companies implied that it was not permitted for other purposes, in particular, for overseas purposes. Thus, the permissive use for domestic purposes became a restriction against the use of overseas MTS for data. It is this self-imposed restriction that the Commission has found to offend the public interest. (A-6) It is this self-imposed restriction that the Commission has held should be lifted. Contrary to the lengthy and repetitive Briefs of the IRCs, the Commission has adopted no rule or policy which it must reverse to allow AT&T to permit its customers to use their international MTS in the same manner as they use their local and interstate services. The Commission has made a determination that international services should conform with domestic practices. Rather than changing policy, the Commission has furthered its policy to permit customers to use their telephone service in any manner which is privately beneficial without being publicly detrimental. Indeed, Commission decisions suggest that the carriers cannot prevent customers from making such uses of their services.

ARGUMENT

Point I

THE COMMISSION'S DETERMINATION THAT IT IS NO LONGER IN THE PUBLIC INTEREST TO RESTRICT TELEPHONE CUSTOMERS FROM USING THEIR OVERSEAS TELEPHONE SERVICE FOR DATAPHONE TRANSMISSION IS AMPLY SUPPORTED BY THE RECORD

The IRCs claim that the Commission's decision was arbitrary and capricious, an abuse of discretion, and unsupported by the record in the following principal respects:

1. The Commission failed to comprehend that the IRCs had proposed to offer a service "fully equivalent" to AT&T's proposed DATAPHONE transmission on MTS.[17]

2. The Commission abused its discretion by deferring its consideration of interconnection questions to a future proceeding.[18]

3. The Commission abused its discretion by failing to respond to the "IRCs' cross-subsidization arguments".[19]

4. The Commission abandoned its prior policies without articulating an adequate rationale.[20]

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[17] RCA Brief, pp. 23-29, WUI Brief, pp. 27-29; ITT Brief, p. 41, footnote 60.

[18] WUI Brief, pp. 37-40.

[19] ITT Brief, pp. 28-32.

[20] ITT Brief, pp. 19-25; RCA Brief, pp. 29-36; WUI Brief, pp. 15-32.

Since all IRC briefs address the fourth point—dealing with the so-called *TAT-4*[21] policy—but not necessarily in terms of "abuse of discretion", this Brief will address that argument in Point II.

This Court has succinctly stated the scope of review in proceedings of this character:

> ". . . [I]t is appropriate that we note the narrow scope afforded a court of appeals in reviewing the Commission's actions under the Federal Communications Act . . . In such cases our task is limited to determining 'whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear'; that is, 'whether the Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of "public interest." ' . . . Thus, 'courts should not overrule an administrative decision merely because they disagree with its wisdom,' but only if they find it to be 'arbitrary or against the public interest as a matter of law.' " Radio Relay Corp. v. FCC, 409 F.2d 322 (2d Cir. 1969) at 326.

By any measure, the IRCs have failed to show the Commission's decision was "arbitrary or against the public interest as a matter of law."

A. The Record fully supports the Commission's judgment that the IRCs proposed a data transmission service significantly different from AT&T's DATAPHONE service.

The IRCs say the Commission's decision was arbitrary and capricious in that it failed to comprehend that the IRCs had proposed a service "fully equivalent" to AT&T's proposed

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[21] AT&T (TAT-4), 37 F.C.C. 1151 (1964).

DATAPHONE transmission on MTS.[22] It is remarkable that this view was advanced most forcefully by RCA, which took great pains to point out the differences between RCA's proposed service and data transmission on MTS.[23]

Specifically, the Commission observed:

> "[T]here are substantial differences between the dataphone-type services proposed by AT&T and those services proposed by the IRCs. Basically, AT&T's service as proposed would simply permit the customer to couple a data set, facsimile, or other equipment to his telephone . . . and utilize Bell's existing switched network. Thus the overseas dataphone-type services which AT&T envisions would be alternate uses of the existing world-wide switched message telephone network, a system which has been engineered primarily for voice. On the other hand, the record carriers propose to offer features significantly different from those of AT&T. Such specialized features, as outlined in RCA's Comments to this inquiry, are code conversion, multi-address capability, camp-on capability, overseas conditioned channels, deferred data mode, speed conversion and other individualized features that AT&T has not proposed to offer." (A-4; Cf A-6, 7)

The record amply supports the Commission's statement. There was substantial evidence supplied by the IRCs themselves that they proposed a different (and superior) service to AT&T's

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[22] RCA Brief, pp. 23-29; WUI Brief pp. 27-29; ITT Brief, p. 41, footnote 60. This view is also advanced to show that the Commission has not adequately explained its departure from the *TAT-4* policy. Since we will see that the Commission has not departed from that policy, we have treated the "fully equivalent services" argument here.

[23] Indeed, RCA devoted major segments of its comments to a "Comparison of RCA Globcom Switched Voice/Data Service with AT&T Dataphone Service" (A-218) and "The Public Interest Requires the Development of Facilities Expressly Designed for Switched Data Use" (A-201) which is admittedly not the case for AT&T's MTS. (A-4)

DATAPHONE transmission both initially and over the long term. The IRCs' Briefs generally conceded that RCA had proposed a different service.[24] Thus, RCA described its "initial services" (A-210) as including alternate and simultaneous voice/data (real time) full duplex transmission, which would reshape and retime data and permit the use of dissimilar modems. (A-210-12) It would also offer "options, which are not available to the present users of AT&T's Dataphone service", including code and speed conversion, channel conditioning and the ability to choose a cable or satellite facility path. (A-212-14, 345) Its "proposed system" would provide computer switching, uni-code, single group and multi-address calling, deferred data mode, camp-on and protection against unauthorized use. (A-215-17) It compared and drew distinctions between RCA's "Switched Voice/Data Service" and AT&T's DATAPHONE transmission. (A-218-19, 340, 349) Elsewhere, RCA emphasized that AT&T's DATAPHONE transmission was unsatisfactory and customers required the superior system of RCA. (A-225-27, 332, 340, 349)

While the other IRCs seem to agree that RCA proposed a different service from AT&T's DATAPHONE transmission, ITT and WUI also proposed to offer services substantially different from DATAPHONE transmission. Thus, ITT proposed a service that would be fully automatic, used equalized coaxial cables (except to countries where only satellite facilities were available which would be differential delay and amplitude equalized), and used conditioned channels only. (A-95, 97-98, 102, 301) WUI's pleadings were somewhat equivocal. WUI seemed to ask only that Commission eliminate a provision in its authorizations for DATEL which restricted the use of voice on DATEL to cue and control purposes only. (A-271-72, 285-86) However, it is also clear that WUI would offer conditioned channels and a cable only service, abbreviated dialing, auto-

[24] ITT Brief, p. 15; WUI Brief, p. 29.

matic retry of busy calls, store and forward switching and departmentalized billing. (A-261, 278, 281, 379, 381, 398)[25]

It is also noteworthy that the IRCs exercised great pains to avoid characterizing their proposed service as "DATAPHONE service". The IRCs referred to their proposed service as "international data/voice demand service" (A-245, 374, 381), "international datel service" (A-257), "international data/voice dial-up service" (A-269, 276, 374) and "switched voice/data, data-only and facsimile service" (A-332, 336, 338; see also A-248-49). Had the IRCs proposed to provide a service the same or "fully equivalent" to AT&T's basic DATAPHONE transmission on MTS, they could readily have said so.[26] Instead, they affixed different labels to their services to emphasize the fact that they were indeed proposing to offer a different service from AT&T's DATAPHONE transmission.

Despite the foregoing, the IRCs' Briefs urge that the IRCs have always sought to provide the same service that the telephone companies would provide. ITT makes the point, but offers no record citations to support its statement.[27] In a long footnote,[28] WUI quotes what we must assume are the most favorable record references to support this argument. Upon close reading, these quotations all refer to proposals to provide "switched overseas voice/data, data-only facsimile services," "in-

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[25] A fourth IRC, TRT Telecommunications Corporation, did not know what kind of service it would provide. (A-368)

[26] The IRCs' pleadings filed with the Commission subsequent to the January 19, 1976 Order (reproduced in the Addendum to Petitioners' Briefs) have had no difficulty stating that the IRCs want to provide exactly the same service that AT&T would provide with DATAPHONE transmission on MTS.

[27] ITT Brief, p. 41, footnote 60.

[28] WUI Brief, pp. 28-29.

ternational data/voice demand service" or the like at rates "comparable to present rates for overseas telephone message services." Similarly, the record references cited by RCA do not support its view that it proposed the same and not a different service. In fact, RCA wrote at length on the differences between its proposed service and DATAPHONE transmission on MTS. A-218-220). It is striking that the IRCs must point to obscure and ambiguous statements to support the demand they state so clearly today—that the IRCs should be authorized to provide precisely the same DATAPHONE transmission on MTS service that the telephone companies could provide today merely by lifting a tariff restriction.

Contrary to the IRCs' claims, the Commission has not mischaracterized their proposals. The Commission has read their presentations in a normal fashion colored by its understanding of the industry and administrative expertise. The Commission viewed the IRCs' proposals as in essence an expansion or enhancement of their present DATEL service—a service different from DATAPHONE transmission on MTS (A-97, 112). There was substantial evidence to support the Commission's view. The IRCs clearly expressed their intent to amplify and expand their existing DATEL service (A-94, 96, 231, 245, 248, 257, 271, 283, 285-86, 338, 374, 379, 397).

The Commission was also correct in "anticipating" the services which AT&T and the IRCs would supply.[29] Of course, it is the Commission's function to evaluate the anticipated future effects of its decisions and the Commission may properly make its determinations on the basis of those evaluations.[30] In any

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[29] ITT challenges the Commission's determination on the basis that it was founded on "assumptions" rather than "actual knowledge" ITT Brief, pp. 41, 44-45.

[30] Washington U. & T. Comm. v. FCC, 513 F. 2d 1142 (9th Cir. 1975) at 1160.

event, AT&T had clearly described the service it would supply if authorized; the IRCs had described the services they would supply if authorized. The Commission merely accepted the IRCs' statement of their intentions and "anticipated" that they would offer the services they had proposed to provide.

Thus, the Commission could find ample support in the record for its conclusion that "[t]here are substantial differences between the dataphone-type services proposed by AT&T and those services proposed by the IRCs". The Order reveals that the Commission was keenly mindful of the fact that, were it to authorize the IRCs to provide the same service as the telephone companies, it would have to find—with no record evidence to support such a finding—that the IRCs' competition with MTS would provide some public good. *RCA Communications, Inc.* v. *FCC*, 346 U.S. 86 (1953), *Hawaiian Telephone Company* v. *FCC*, 498 F. 2d 771 (D.C. Cir. 1974). (A-7) In its view, it could make such a finding only on the assumption that the IRCs would provide specialized services as described most thoroughly by RCA.[31]

B. The Commission did not abuse its discretion by deferring its consideration of interconnection questions to further proceedings.

The Commission has determined to face questions relating to the interconnection of the IRCs' service to the domestic tele-

[31] Similarly, the Commission has authorized specialized common carriers (SCCs) to compete with the established telephone companies largely on the basis that the SCCs would provide new and different services, and not the same services, as the telephone companies. Microwave Communications, Inc., 18 F.C.C. 2d 953 (1969); Specialized Common Carriers, 29 F.C.C. 2d 870, affirmed sub nom. Washington P. U. & T. Comm. v. FCC, 513 F. 2d 1141 (9th Cir. 1975), cert, denied 423 U.S. 836 (1975).

phone network in separate proceedings. (A-8-9) ITT and WUI view this decision as an abuse of discretion.[32] On the contrary, the Commission has acted reasonably in arranging its dockets to address the questions before it. The procedure it followed was particularly appropriate in this case.

The decision to address the basic policy question—whether the permissive use of MTS for data transmission is in the public interest—and the interconnection question in two phases is not an abuse of discretion. The Commission has the power to control its dockets and is "free to fashion [its] own rules and procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties". *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) at 143; *FCC* v. *WJR*, 337 U.S. 265 (1949) at 282-83; *FCC* v. *Schreiber*, 381 U.S. 279 (1965); *Associated Press* v. *FCC*, 448 F. 2d 1095 (D.C. Cir. 1971); Communications Act of 1934, Section 4(j), 47 U.S.C.A. § 154(j).

It is particularly appropriate that the Commission did not undertake to resolve interconnection questions in the context of the decision below. Although the Notice of Inquiry recited that the IRCs had not articulated their interconnection requirements to the satisfaction of the Commission (A-11)[33] and invited spe-

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[32] ITT Brief, pp. 32-33, WUI Brief, pp. 37-40.

[33] "[The IRCs] state, as indicated, that the interconnection of the domestic telephone network with their facilities is technically feasible, but they include no data on equipment required for such purposes; the cost thereof; the procedures for handling calls, including those involving direct distance dialing and those handled by operators; the delay, if any, in calls handled by the telegraph carriers' overseas facilities; prospective rates; billing procedures; divisions of tolls among the telephone company or companies involved, the international record carriers and the foreign carrier or carriers, availability of direct circuits to overseas countries, and the procedures and arrangements for the handling of calls at and beyond these carriers' overseas terminals." (A-11)

cific proposals (A-15), the IRCs made only general comments concerning the nature of the interconnection desired or contemplated. (A-102, 177, 180, 207-09, 221, 250, 273, 339)[34] Clearly, the Commission was not in a position to make a reasoned policy decision in this proceeding and on the basis of this record. The Commission correctly determined to defer an expression of its views in this area, again giving the IRCs the opportunity to state their interconnection demands. (A-8)

The Commission's Order has afforded the IRCs the opportunity to state what interconnection and facilities not previously provided they require to provide their enhanced data services. The IRCs have availed themselves of that opportunity.[35] The Commission has adopted reasonable procedures for addressing the questions before it. In this proceeding, it has decided the basic public interest question—that DATAPHONE transmission on MTS would serve the public interest. It has decided to resolve the interconnection question in a separate proceeding. The Court "should not upon mere conjecture precipitously condemn this procedure without giving it an opportunity to be tested."[36]

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[34] ITT made a somewhat more extensive statement of interconnection demands without, however, addressing all the matters in which the Commission had expressed an interest, or showing the cost or feasibility of its proposals or how they would serve the public interest. (A-116-18) Similarly, WUI filed an unauthorized and dilatory letter (well beyond the pleading period) shortly before the Commission adopted its decision, stating more definitive interconnection demands. (A-409)

[35] Addendum to Petitioners' Briefs, pp. 1, 15, 40, 47.

[36] Radio Relay Corp. v. FCC, 409 F. 2d 322 (2d Cir. 1969) at 329.

C. The Commission's Order cannot be faulted for failure to consider the so-called "cross subsidy" issue.

ITT states:

> "No where in its Order does the FCC expressly discuss the possibility that AT&T will use its large financial resources to subsidize unfair competition between its international Dataphone services and the IRCs' existing services or their proposed alternate voice-data offerings . . ."[37]
>
> . . .
>
> "[T]he IRC's cross-subsidization arguments clearly required more of a response then the Order's inarticulate, unexplained assumption that cross-subsidization would not occur."[38]

ITT's reference to the "IRC's cross-subsidization arguments" is surprising for they are extremely hard to find in the record.[39] The conclusion is inescapable that the IRCs have made no cross-subsidy argument before the Commission and that the "cross-

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[37] ITT Brief, p. 28.

[38] ITT Brief, p. 32.

[39] Most of the "cross-subsidization" arguments referred to in ITT's Brief were made in other proceedings. In this proceeding, ITT has referred to AT&T's "*ability* to cross-subsidize" (emphasis added) (A-86, 92, 293) without further elaboration. The other IRCs did not develop the point. In any event, ITT proves nothing by making the bare assertion that AT&T has the mere ability to cross-subsidize without some showing of probable cause to believe that AT&T would indeed exercise that ability. The Commission is "not concerned with what *might* occur, in the prospective vein that petitioners fears . . . have been voiced, but rather with what an analysis of presently existing practices would show." (emphasis added) Gerard T. Uht, 37 F.C.C. 2d 326 (1972) at 332; AT&T (Interstate Telephone Service) 38 F.C.C. 2d 981 (1972) at 982-83; Comsat General Corp., F.C.C. 76-435, released May 13, 1976, paras. 6, 10-11; Connecticut v. Massachusetts, 282 U.S. 660 (1930) at 674.

subsidy" issue is not available to them before this Court. The Petitioners may not ask this Court to rule on matters of fact or law they have not addressed before the Commission.[40]

More importantly, there can be no "cross subsidy" of overseas DATAPHONE transmission since it is merely a permissive use of MTS. In effect, the IRCs argue that the customer who makes less advantageous use of his telephone subsidizes the customer who uses his phone to greater advantage (such as using it for DATAPHONE transmission). This is nonsense. MTS cannot subsidize DATAPHONE transmission because DATAPHONE transmission *is* MTS. The customer pays the same MTS rate for a DATAPHONE call as he pays for any ordinary telephone call.

In any event, the Commission has plenary jurisdiction over the telephone companies' rates for overseas service. The Commission has active proceedings looking into all phases of telephone company rate making[41] and is looking specifically at the telephone companies' rates for overseas MTS in Docket No. 20778.[42]

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[40] The Petitioners' remedy was to petition the Commission for a rehearing. Section 405 of the Communications Act provides that "[t]he filing of a petition for rehearing shall not be a condition precedent to judicial review of any [Commission] Order . . . except where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." Communications Act, Section 405; 47 U.S.C.A. Section 405.

[41] E.g. F.C.C. Dockets Nos. 19129, 20376 and 18128. See AT&T (Interstate Telephone Service), 57 F.C.C. 2d 950 (1976); AT&T (Interstate Telephone Service) (Initial Decision), F.C.C. 76 D-41, released August 2, 1976; AT&T (Private Line Services) (Recommended Decision), F.C.C. No. 59797, released January 19, 1976.

[42] Preliminary Audit and Study, F.C.C. 76-396, released May 7, 1976.

The IRCs' concern for cross-subsidy is surprising. In recent years, the Commission has had numerous occasions to consider underpricing and cross-subsidies by the IRCs.[43] The IRCs are equally capable of cross-subsidizing their DATEL service revenues from telex and AVD, and recent history suggests that they are not averse to the practice.

Point II

THE COMMISSION'S DECISION THAT DATAPHONE TRANSMISSION ON MESSAGE TELECOMMUNICATIONS SERVICE (MTS) SHOULD BE PERMITTED DOES NOT DEPART FROM ITS PRIOR POLICIES, BUT RATHER IS IN FURTHERANCE OF THOSE POLICIES.

ITT, RCA and WUI premise their principal legal argument upon the *TAT-4 Decision*.[44] In their view, the *TAT-4 Decision* establishes a near-inflexible Commission policy that AT&T should forever be excluded from the overseas record communications field, the Commission has departed from that policy and it has not adequately explained its reasons for doing so.

On the contrary, the *TAT-4 Decision* establishes no policy that MTS may not be used for record communications; thus, the Commission has changed no policy[45] and, thus, the cases

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[43] Leased Channel Inquiry, 44 F.C.C. 2d 755 (1974); RCA Global Communications, (Guam-Philippines Voice Channels), 49 F.C.C. 2d 290 (1974), ITT World Communications (AVD Channels to Guam), 54 F.C.C. 2d 327 (1975); ITT World Communications et al (AVD Channels to Guam), 56 F.C.C. 2d 383 (1975), Preliminary Audit and Study, supra, at p. 10.

[44] AT&T (TAT-4 Decision), 37 F.C.C. 1151 (1964).

[45] "This decision should in no way be construed as reversing this [TAT-4] policy . . ." (A-6)

cited by the IRCs[46] form no basis for attacking the Commission's Order. As we shall see, the Commission's decision is in furtherance of other Commission policies to augment the usefulness and value of telecommunications services to customers.

We will show that the *TAT-4 Decision* is inapposite because it concerns restrictions on AT&T's private line (competitive) services as contrasted to AT&T's MTS (monopoly) service. Further, we will show that the Commission's policies have favored the relaxation of explicit or implied restrictions on the use of MTS for data or other purposes. Third, we will show that Commission policies have favored the availability of DATAPHONE transmission to customers and, in the only case where the Commission has considered the use of DATAPHONE transmission to an offshore location, it has granted the telephone companies authority to permit DATAPHONE use. We will show that—both before and after the *TAT-4 Decision*—the Commission has rejected the *TAT-4* rationale; further, that the rationale—as recognized by the Commission in this case—does not support a Commission mandate barring the telephone companies' customers from using MTS for DATAPHONE transmission. Finally, we shall comment on the IRCs' argument that AT&T has misled the Commission and the IRCs in stating an intention to stay out of the international record communications field.

A. The Distinction between MTS and Private Line Services

In *TAT-4*, the Commission determined that AT&T should not be authorized to provide "*leased* circuits for alternate voice-record service"[47] (emphasis supplied). The Commission's deci-

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[46] ITT Brief, pp. 19-24; RCA Brief, pp. 29-36; WUI Brief, pp. 27-31.

[47] TAT-4, 37 F.C.C. at 1158, 1160.

sion did not relate in any way to MTS and cannot be regarded as expressing or implying any policy with respect to MTS.

The Commission has drawn meaningful distinctions between the telephone companies' MTS and private line services. It has differing policies for both, based on its view that MTS is a monopoly service whereas private line service is competitive. The Commission has discouraged competition for MTS, but promoted competition for private line.[48] For MTS, the Com-

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[48] MCI Telecommunications Corp., F.C.C. 76-622, released July 13, 1976 at paras. 36, 89. In testimony before the House Appropriations Subcommittee, FCC Chairman Wiley expressed the view that:

> "It is competition in a limited area of the Bell System business. I have heard all the arguments about the cream skimming, taking the cream and leaving the unprofitable markets to the overall system.
>
> "All I can say is that what we are basically talking about is just this one area, private line service. We are not talking about MTS, Message Toll Service.
>
> "I would like to say also, I don't think there should be competition in that area. That is a natural monopoly . . ." Hearings before the Subcomm. on the Departments of State, Justice and Commerce, the Judiciary and Related Agencies of the House Comm. on Appropriations, 81st Cong., 1st Sess. at 374 (1975); see also Id. at 366, 383.

See also, Chairman Wiley's speech before the United States Independent Telephone Association (October 16, 1975), F.C.C. No. 56422. On March 11, 1975, Chairman Wiley stated to the House Subcommittee on Communications during its hearings on an overview of the FCC.

> "Mr. Wiley. One thing you must understand—the competition we have introduced has been in the private line and not the message toll service, which is the basic service we have been talking about to the resident." Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 81st Cong., 1st Sess. at 60 (1975).

mission regulates to see that rates are not too high,[49] whereas, for private line rates, the Commission's usual concern is that rates are not unreasonably low to the point that they unfairly restrict competition.[50] The Commission has encouraged rate averaging for MTS for socially desirable purposes,[51] but it favors cost-based pricing in private line because of competitive effects.[52] The Commission has on occasion excluded or deferred the telephone companies' provision of some private line services[53] but it has never restricted the use of MTS and has in fact encouraged the goal of a universal, flexible MTS service.[54] The Commission will accept different terms and conditions applicable to MTS offerings as compared to private

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[49] AT&T (Interstate Telephone Service), 57 F.C.C. 2d 950 (1976).

[50] AT&T (Private Line Service) (Recommended Decision), F.C.C. 59797, released January 19, 1976; AT&T (High Density-Low Density Tariffs) (Interim Decision), 55 F.C.C. 2d 224 (1975); Order on Reconsideration, 58 F.C.C. 2d 362 (1976).

[51] Domestic Communications-Satellite Facilities, Second Report and Order, 35 F.C.C. 2d 844 (1972) at 856-59; Order on Reconsideration, 38 F.C.C. 2d 665 (1972) at 695-96; Integration of Rates and Services, F.C.C. 76-655 released July 20, 1976, p. 6.

[52] AT&T (Telpak Rates), 37 F.C.C. 1111 (1964), affd. sub nom. American Trucking Associations v. FCC, 377 F. 2d 121 (D.C. Cir. 1966); AT&T (Interstate and Foreign Rates), 2 F.C.C. 2d 871 (1965) at 872.

[53] Domestic Communications-Satellite Facilities, Second Report and Order, 35 F.C.C.2d at 851, Order on Reconsideration, 38 F.C.C. 2d at 676-80 (three year moratorium on provision of private line service via satellite, no moratorium on MTS); Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C. 2d 307 (1970), modified 22 F.C.C. 2d 746 (1970), affd. sub nom. General Telephone Co. of the Southwest v. U.S., 449 F. 2d 846 (5th Cir. 1971).

[54] Microwave Communications, Inc., 18 F.C.C. 2d 953 (1969) at 972 (Chairman Hyde dissenting).

line offerings.[55] Thus, the IRCs effort to use a private line decision to establish an MTS policy is completely misplaced.

B. Commission Policies Favoring Liberalized Use of MTS

In the MTS area, the Commission has adopted a series of policies which, in its view, gives telephone company customers greater flexibility in the use of their telephone service. Thus, in *Hush-A-Phone*,[56] it struck down a tariff provision which was construed to prevent the use of an acoustical silencing device. In *Carterfone*,[57] it struck down a tariff which had been construed to prohibit the use of an acoustical coupling device which enabled mobile radio systems to be used in conjunction with the telephone network. Recently, the Commission has adopted policies looking toward the wholesale interconnection of customer-provided terminal devices with the telephone system.[58] In each case, the Commission has based its determination on whether the arrangement was "privately beneficial without being publicly detrimental".[59] Where the answer was "yes", the Commission has found it in the public interest for custom-

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[55] Regulatory Policies Concerning Resale and Shared Use, F.C.C. 76-641, released July 16, 1976, para. 50-55. "[B]oth MTS and WATS are switched services, with characteristics distinct from those of private line services, and we are not prepared to warrant that removal of the restrictions on WATS would lead to the benefits which we foresee for private line service." Id., para. 55.

[56] Hush-A-Phone v. U.S., 238 F.2d 266 (D.C. Cir. 1956); Hush-A-Phone v. AT&T, 22 F.C.C. 112 (1957).

[57] Carterfone, 13 F.C.C. 2d 420 (1968), reconsideration denied 14 F.C.C. 2d 571 (1968).

[58] Interstate and Foreign Message Toll Telephone Service, 58 F.C.C. 2d 736 (1976).

[59] Hush-A-Phone, 238 F.2d at 269, 22 F.C.C. at 113-14.

ers to use MTS in the proposed manner. Indeed, it has determined that the telephone companies cannot prevent such use.[60]

The Commission decision below recognized this distinction, that *TAT-4* involved AVD where "the subscriber leases a voice grade private line which he may use for both voice and record communications" whereas the present inquiry involves "the potential removal of a restriction which, in the case of AT&T, precludes use of the existing switched telephone [MTS] network." (A-6)[61] The Commission's decision below may be viewed as an application of its policy to permit telephone customers to use their telephone service in ways that are "privately beneficial without being publicly detrimental".

C. Commission Policies favoring Use of MTS for DATAPHONE transmission

For many years, the Commission has permitted DATAPHONE transmission on MTS within the continental United States even though this use would—in theory—adversely affect Western Union, the domestic telegraph carrier. The Commission's decision in this proceeding may also be regarded as a modest extension of policies and practices now applicable domestically. Thus, the decision below furthers, rather than reverses, present policies.

The Commission has had occasion to consider overseas DATAPHONE transmission directly only once. In 1965,

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[60] See Keliipio, 54 F.C.C. 2d 549 (1975) at 550; AT&T (Mebane Home Telephone Co.), 53 F.C.C. 2d 473 (1975) at 477.

[61] See also A-1, 4, Cf A-10. Further emphasizing this distinction, the Commission said, "we are limiting AT&T's overseas dataphone services at this time to those which may be supplied via its existing overseas switched network, excluding dedicated private line services". (A-7)

AT&T modified its MTS Tariff F.C.C. No. 132 to authorize the use of MTS for data transmission to Hawaii.[62] The IRCs petitioned to suspend those tariffs, citing the same reasons they have argued before the Commission and this Court, namely, that the offering of DATAPHONE use would jeopardize their ability to provide record services to Hawaii, that AT&T's market entry would create a precedent which would destroy the IRCs and that the *TAT-4 Decision* mandated a rejection of the AT&T tariff. The Commission rejected the IRCs' petitions.[63]

Hawaii DATAPHONE underscores the fact that the Commission has no policy which precludes DATAPHONE transmission on overseas MTS and, accordingly, that the Commission's action below does not depart from previous Commission policy. After noting that "except for Hawaii, A.T.&T.'s authorizations for services to overseas and foreign points do not include authority to provide Data-Phone service," the Commission observed that "any such extension of that service would require application to us by A.T.&T. which we would evaluate on its merits at that time."[64] The Commission's decision below has now directed the Chief of the Common Carrier Bureau to accept such an application.

The *Hawaii DATAPHONE* decision stemmed from the *HAW-1* decision[65] where the Commission—before *TAT-4*—authorized AT&T and the Hawaiian Telephone Company (HTC) to construct the first Mainland/Hawaii cable (HAW-1) without "restriction as to the use of [the cable] to supply record

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[62] As noted previously (*supra*. p. 4, footnote 6), Hawaii has been historically treated as an "overseas" location.

[63] AT&T (Hawaii DATAPHONE), 38 F.C.C. 1222 (1965); 1 F.C.C. 2d 374 (1965).

[64] 1 F.C.C. 2d at 375.

[65] AT&T (HAW-1), F.C.C. 55-915, released September 8, 1955; order on reconsideration, 44 F.C.C. 602 (1955).

communication (telegraph) service in addition to voice communication (telephone) service".[66] The IRCs vigorously urged a condition that would prohibit AT&T from providing telegraph service. Similarly, they made all the economic arguments they now make to this Court. They asserted the "adverse effects" on the IRCs of even limited entry by AT&T into the telegraph market. They told the Commission that AT&T entry would have "far reaching revolutionary implications" "the end result of which could only be the impairment of the international telegraph industry as it now exists".[67] In spite of the IRCs' warnings of disaster, the Commission refused to set aside the authorization and, in spite of the Commission's action, the IRCs continued to provide record services to Hawaii and the threatened "revolutionary effects" have not occurred.[68]

In passing, it is noteworthy that the Commission observed "[w]e have also reviewed the provisions of the Act and cannot find any provision or combination of provisions which would, as a matter of law, require us to prohibit AT&T from providing the service at issue herein".[69]

Following *HAW-1*, the Commission reached a similar decision in *TAT-2 Microwave*.[70] AT&T applied for authority to modify its microwave radio relay licenses in Maine to enable the system to be used in connection with the second transatlantic cable (TAT-2) which landed in Canada. AT&T sought authority to use the cable to provide alternate and simultaneous voice and non-voice services to the defense agencies of the United

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[66] 44 F.C.C. at 602.

[67] 44 F.C.C. at 603-04.

[68] See infra, p. 41.

[69] 44 F.C.C. at 605; accord, TAT-2 Microwave Order, F.C.C. 59-658, released July 2, 1959, para. 20.

[70] AT&T (TAT-2 Microwave), F.C.C. 59-658, released July 2, 1959.

States Government. As in *HAW-1*, the IRCs again argued that AT&T's entry into the international telegraph field represented a serious threat to their financial situations and jeopardized their ability to continue as active competitive elements in international communications. And again, the Commission rejected these arguments.

The Commission noted that there had been "a long standing general policy in favor of the separation of voice and record services in the international communications field"[71] but that this was not a "doctrinaire or absolute" policy.[72] The Commission concluded that "all the factors which collectively make up the public interest dictate a change in our policy of separation between voice and record communications in transatlantic service". Significantly, the Commission noted that "there is no specific statutory requirement that international voice and record communication be provided by separate entities".[73] When the third transatlantic cable (TAT-3) was installed, the Commission included the same authorization in AT&T's certificate of convenience and necessity.[74]

D. The TAT-4 Decision

While the Commission had once followed—without any express determination to do so—a policy of having separate carriers provide voice and telegraph services, it had reversed that policy in *HAW-1* and *TAT-2 Microwave*. Thus, *TAT-4* was a reversal of previous policy with respect to AVD private line service—on tenuous grounds.

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[71] Id. para. 19.

[72] Id. para. 20.

[73] Id. para. 20.

[74] AT&T (TAT-3), F.C.C. 61-323, released March 13, 1961.

In *TAT-4*, the Commission changed its policy for several reasons. First, the IRCs were confined to "gateways", whereas AT&T had access to the "hinterland". Second, AT&T had a large sales force. Third, AT&T was large and the IRCs were small and AVD meant more to the IRCs than it meant to AT&T. Fourth, the Commission emphasized that "[t]he use by customers of leased circuits for alternate voice-record use is, with the exception of the defense agencies, a new service."[75] Thus, to "assure the viability of the record carriers", the Commission determined to "protect . . . them from the losses they would inevitably suffer" were AT&T to provide AVD service.[76] The IRCs now use this "protectionist" decision to support their arguments for "competition". The IRCs do not seek competition, they seek market allocation.[77]

The Commission based its *TAT-4* decision on unfounded fears for the survival of the IRCs. Moreover, the telecommunications environment has changed since *TAT-4*. Previously, the IRCs provided services only from two or three "gateways", but today the gateways have expanded to five and all carriers have requests pending to expand to about 25 gateways blanketing the country.[78] Thus, they will have substantial access to the hinterland. Second, AT&T does have a marketing effort but ITT and

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[75] TAT-4, 37 F.C.C. at 1158-59.

[76] 37 F.C.C. at 1159.

[77] The IRCs have strenuously fought to keep new entrants out of their markets. Tropical Radio Tel. Co., 35 F.C.C. 2d 950 (1972), reconsideration denied, 40 F.C.C. 2d 1168 (1973) (service to Italy); TRT Telecommunications Corp., 46 F.C.C. 2d 1042 (1974) (service to the United Kingdom); TRT Telecommunications Corp., 49 F.C.C. 2d 1408 (1974) (service to Germany).

[78] IRCs' Scope of Operations, 54 F.C.C. 2d 532 (1975). "It is our view that the public interest would be served by authorizing some new gateway cities . . ." 54 F.C.C. 2d at 533. To the same effect, IRCs' Scope of Operations, 57 F.C.C. 2d 250 (1975).

RCA far exceed AT&T's advertising expense per sales dollar.[79] Third, AT&T remains substantially larger than ITT, RCA and WUI although these companies are by no means insignificant. Most importantly, the Commission's fear that AT&T entry into the AVD market would threaten the viability of the IRCs has proved completely unfounded.[80] Time and history have eroded the rational basis for the so-called *TAT-4* policy.

We have shown that the Commission's Order has not departed from any *TAT-4 policy;* thus, the Commission was under no mandate to explain a departure from past policies. However, we will comment on one argument the IRCs have made in this connection. The IRCs make a strong point that the Commission did not advance a significant distinction when it explained that, in *TAT-4*, AT&T and the IRCs would respectively have to make about the same investment to provide the service in question whereas, in the present case, AT&T would have to make little or no investment while the IRCs would have to make a substantial investment.[81] If anything, ITT argues, this consideration weighs in favor of excluding AT&T from international DATAPHONE service.[82]

Certainly, the IRCs cannot reasonably challenge the Commission's observation that the IRCs would incur a substantial investment in providing the new services they proposed whereas

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[79] In 1975, RCA spent $89.0 million for media advertising and ITT $73.1 million or $18.5 per $1000 of sales for RCA and $6.4 for ITT. Advertising Age, Vol. 37, No. 34, p. 1 (August 23, 1976). (WUI notes the "aggressive marketing of the competitive record carrier industry" (A-388)). This compares with $101.7 million for AT&T or $0.28 per $1000 of sales. Of course, ITT and RCA advertising covers many products and services sold by those companies, as does AT&T's advertising program cover the many different services AT&T provides.

[80] See infra, pp. 40-41.

[81] ITT Brief, p. 19-20; RCA Brief, p. 34; WUI Brief, pp. 29-30.

[82] ITT Brief, p. 20.

AT&T would not incur any substantial expense in permitting its customers to use its existing MTS for DATAPHONE transmission. (A-5, 6, 7) There was substantial evidence that the IRCs would incur such costs (A-122, 232, 339, Cf A-277) and that AT&T would not. (A-158)

The IRCs' arguments miss the point. The Commission was drawing a distinction between a new service and an existing service. (A-6) The *TAT-4* decision viewed AVD as a new service. Whatever carriers were authorized to provide the service, the carriers would each have to make the same new investment to provide the facilities for the new service. In this context, the Commission exercised its discretion to keep AT&T from entering what it regarded as a new market since, among other things, AT&T could provide the facilities for that service at no significantly lower investment.

In the case of DATAPHONE transmission, the Commission does not face the provision of a new service. AT&T now provides MTS, the IRCs do not. AT&T does not have to make an additional investment to permit DATAPHONE transmission, whereas the IRCs would have to make a significant investment if they were to develop a similar capability. The Commission saw the question as, how should customers be permitted to use their existing service, not who should be permitted to enter a new market. The Commission's discussion of investment explains its view that it was addressing the question of an existing, not a new service. Thus, the Commission said:

> "The instant inquiry involves the potential removal of a restriction which, in the case of AT&T, precludes use of the *existing* switched telephone network for a service which requires little or no additional investment by the carrier." (emphasis supplied) (A-6).

Repeatedly, the Commission emphasized that the issue before it was removing a restriction on an existing service. (A-7).

Assuming, *arguendo*, that the Commission may be regarded as departing somewhat from the *TAT-4* policy, as we have shown above and elsewhere, it acted reasonably and in accordance with law in doing so:

> "A regulatory agency is not bound 'to deal with all cases at all times as it has dealt with some that seem comparable.' . . . it may alter its past rulings and policies in light of new developments or on further consideration of a policy. . . . The agency must of course furnish 'an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.' . . ." (citations omitted)[83]

The Commission's discussion and analysis meet this test.

E. AT&T's "Representations"

Also irrelevant to the issues before the Court but meriting response are the IRCs' veiled charge that AT&T has, for years, been misleading the Commission and the IRCs with respect to its intent to enter the international record business.[84] Parenthetically, it is difficult to see how any such "representation" has advantaged AT&T since it is continually argued as a reason to exclude AT&T from providing some service or other.

The IRCs cite[85] the Commission opinion in *Hawaii DATAPHONE* where the Commission said, referring to the *HAW-1 Order:*

> "We noted . . . with respect to the concern expressed in the petitions that the provision by A.T.&T.

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[83] Pocket Phone Broadcast Service v. FCC No. 74-2040 et al, (D.C. Cir. July 16, 1976) at p. 9.

[84] WUI Brief, p. 22, Cf pp. 19, 20; ITT Brief, p. 22, footnote 36, (A-85-88, 194, 246, 268, 293-94).

[85] WUI Brief, p. 21-22.

> of telegraph service with Hawaii may be a first step in the entry of A.T.&T. into the international record field, that we had 'the unequivocal assurance of A.T.&T. that it has no intention to enter into and, in fact, has a "*desire to stay out of the international record field*" ' "[86] (emphasis supplied)

In fact, this citation is a misquote of the earlier *HAW-1 Order* which said:

> "We note that AT&T does not propose to provide message telegraph service over its cable . . .
>
> . . .
>
> ". . . We have before us the unequivocal assurance of AT&T that it has no intention to enter into and, in fact, has a "*desire to stay out of the international telegraph field.*"[87] (emphasis supplied)

The misquote of the *HAW-1 Order* subtly changes its meaning. AT&T had expressed a desire to stay out of the "international telegraph field" which, in 1955, meant message telegraph service. At that time, some IRCs (then referred to as the "international telegraph carriers") provided a limited amount of private line telegraph and some Telex service. AT&T's statement was to the effect that it intended to stay out of those fields.[88]

The argument that AT&T's statement reflected a commitment to stay out of any and all record services is belied by the fact that this statement was made in connection with an AT&T proposal to provide AVD private line service—a voice/record service. Thus, there was no representation that AT&T planned

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[86] Hawaii DATAPHONE, 38 F.C.C. at 1224.

[87] Hawaii-1 Order, paras. 20, 23.

[88] The Commission had the same view of the telegraph business: "What the Commission was addressing itself to in 1956 was therefore the use of a telephone facility to provide a pure telegraph service, i.e. message service, international teletypewriter service or leased channel telegraph service," TAT-2 Microwave, at para. 22.

to stay out of all present and future record type services. Certainly, there was no representation that AT&T would restrain its customers from using the MTS network.

The IRCs also mention a statement by an AT&T counsel in a prehearing conference to the effect that, if the international telegraph carriers could provide a particular service a customer required, that "washes us out of the case".[89] An examination of the transcript reveals that this comment merely pertained to the manner in which AT&T proposed to present evidence in the proceeding. The U.S. Air Force had represented to AT&T that AT&T's transatlantic cable was the "only satisfactory means" of meeting a classified service requirement. AT&T counsel's comment—later explained—meant that it had no intention of introducing evidence on the question whether the AT&T facility was the only means of meeting the Air Force requirement nor on the question whether the international telegraph carriers were or were not capable of providing the service.[90] Importantly, neither RCA[91] nor Western Union counsel saw AT&T counsel's remark as a significant statement of company policy and Western Union counsel saw any AT&T commitment as limited as to time.[92] Common Carrier Bureau counsel said that the question of whether the service in question was an "international telegraph service" was not in the case and he would object if the parties sought to interject it.[93]

Thus, the IRCs distort AT&T's "representations". The record rebuts the IRCs' inference that AT&T has acted in bad faith in failing to live up to commitments to stay out of the "international telegraph business".

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[89] WUI Brief, p. 20.

[90] AT&T, Docket No. 12569, Prehearing Conference, September 22, 1958, Tr. 5, 6, 13, 14.

[91] Id., Tr. 10.

[92] Id., Tr. 19.

[93] Id., Tr. 16, 17.

Point III

THE COMMISSION HAS ADEQUATELY ADDRESSED THE COMPETITIVE ISSUES RAISED BY THE NOTICE OF INQUIRY

The IRCs advance a multitude of arguments under the heading of "competitive issues". The IRCs argue that the Commission has made the question of anti-competitive effects a matter of proof and placed the burden of proof on the IRCs, that competitive questions are so important that, even if the IRCs did not themselves raise the questions adequately, the Commission should have raised them *sua sponte*, that the Commission should have afforded the IRCs an opportunity to show anti-competitive effects through oral examination or some other suitable procedure and that the Commission should have considered less anti-competitive alternatives to the course of action it took.

A. Projected Economic Impact

As previously noted, the IRCs have claimed that, if the telephone companies were to permit their customers to use MTS for overseas DATAPHONE transmission, this would promote an AT&T monopoly of overseas record services and jeopardize the viability of the IRCs. They argue that the Commission has unfairly required them to prove their allegations of anti-competitive effects.

The IRCs premise their argument on the Commission's statement:

> "Despite the opportunity granted to them by this inquiry, the IRCs have not justified their allegation that they would suffer a significant decline in Telex and AVD service such as to have a substantial adverse effect upon the provision of their services to the public." (A-7).

The IRCs urge that this statement reveals that the Commission unfairly imposed a burden of proof on them to prove anti-competitive effects. Nothing could be further from the truth. The Commission neither expressly nor impliedly imposed a "burden of proof" on the IRCs. It merely commented that they had not advanced persuasive evidence to support the alleged threat to their viability.

The Notice of Inquiry had expressly raised questions concerning the impact that DATAPHONE transmission on MTS would have on the IRCs[94] The Commission specially noted that the IRCs had not advanced any specifics as to claimed economic impact. (A-11) Nevertheless, the IRCs have contented themselves in this proceeding with generalized statements about how big AT&T is and small they are (A-88-89, 188, 190, 198-200, 262, 269, 283), how DATAPHONE transmission means little to AT&T (A-367), how AT&T is a monopoly and how its monopoly would grow if it were permitted to provide DATAPHONE transmission (A-84, 88, 177, 188, 265, 267; 269, 278, 283, 293, 334, 372-73) and how AT&T's DATAPHONE transmission would jeopardize the viability of the IRC industry (A-86, 92, 131, 188, 190, 230, 233-34, 265, 294-95, 333, 380, 396).[95] At no time did they give substance to their generalized charges, for example, by looking to the impact of AT&T's Hawaii DATAPHONE transmission on the IRCs' Hawaiian

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[94] The issues included "the effect on the revenues and service requirements of each respondent carrier should one or more carriers in addition to said respondent be authorized to provide overseas dataphone or equivalent services"; "how the public interest, convenience and necessity will be served by authorizing one or more international carriers to provide overseas dataphone or equivalent service"; "any other information considered relevant to this inquiry". (A-7, 11, 15)

[95] RCA was able to predict that the market was just large enough to support competition among the IRCs but not large enough to support competition by AT&T. (A-229, 333)

services or the impact of AVD on their other services.[96] The Commission—with the Courts' approval—has rejected these kinds of generalized claim as a reason for withholding action otherwise in the public interest.[97]

The Commission's procedures afforded the IRCs an opportunity to present some corroborating details to support their claims of potential economic injury, but they did not do so. One explanation for their oversight is the fact that they have made similar claims before and history has proved them false. Specifically, the Commission's *TAT-4* determination that AT&T entry into the AVD market would threaten the viability of the IRCs has proved wrong. In 1964 (the year of the *TAT-4 Decision*), the total revenues of the IRCs for all services was $90.0 million. By 1973, these revenues had grown to $224.1 million, some 149%.[98]

The IRCs have expressed special concern about the impact of competition on their Telex revenues (A-5, 191, 229, 333-34, 333, 341) whereas message telegram business has not been growing for other reasons. (A-233) Despite the competition from the new AVD business, Telex revenues grew from $17.2 million in 1964 to $114.4 million in 1973, a growth of over 500%.[99] History has proved that the AVD business has had no significant impact on the IRCs' rapidly growing Telex revenues.

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[96] See infra, pp. 40-41.

[97] Gerard T. Uht, 35 F.C.C. 2d 140 (1972) at 148; 37 F.C.C. 2d 326 (1972) at 327, 332; AT&T (Interstate Telephone Service), 38 F.C.C. 2d 981 (1972) at 982-83; Comsat General Corp., F.C.C. 76-431, released May 13, 1976, para. 6, 10-11; Pocket Broadcast Service v. FCC, Civil No. 74-2040 et al (D.C. Cir. decided July 16, 1976) at 5, 7, 8.

[98] Federal Communications Commission, Statistics of Communications Common Carriers, year ended December 31, 1973.

[99] Id.

The 500% growth suggests that the Commission was wrong when it determined that AT&T entry into the AVD market would threaten the viability of the IRCs.[100]

As noted above, the IRCs made similar arguments the following year in *Hawaii DATAPHONE*. In that year, total revenues for the IRCs for Telex service to Hawaii were $561,735. By 1970, these revenues had grown to $1,849,269, or an increase of 329% (A-323). By 1973, they had grown to $2,583,035, some 460% over 1965 levels.[101] Thus, despite AT&T's DATAPHONE offering, the IRCs' Mainland/Hawaii business has flourished and their "viability" arguments have been nothing more than a man crying "wolf".

The Commission below was keenly sensitive to this background which was brought to its attention in the record (A-148, 150, 323). It observed that DATAPHONE transmission had been introduced to Hawaii "with no indication of a negative impact on other services" (A-7); further that, "[d]omestically, Dataphone, TWX, Telex and voice grade private line services (which may be used for voice and data transmission) have all been offered for many years and a market appears to exist for them all". (A-7) Thus, "bringing the deposit of its experience, the disciplined feel of the expert, to bear"[102] to the record in this proceeding, the Commission could properly reject the IRCs' arguments herein that DATAPHONE transmission "would eventually threaten the viability of their other services such as Telex and Datel" (A-2), "that their very survival is depend-

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[100] Presumably, the IRCs' AVD services had the same adverse effect on the IRCs' Telex services as would have occurred had AT&T provided the AVD service.

[101] Federal Communications Commission, Statistics of Communications Common Carriers, year ended December 31, 1973, p. 180.

[102] FCC v. RCA Communications, Inc. 346 US 86 (1953) at 91.

ent upon [its] precluding AT&T from international dataphone service" (A-3), and that "AT&T entry would undermine the international carrier industry as it now exists". (A-5). The Commission correctly observed that "[d]espite the opportunity granted to them by this inquiry, the IRCs have not justified their allegation that they would suffer a significant decline in Telex and AVD service such as to have a substantial adverse effect upon the provision of their services to the public" (A-7), and, further, that "[n]othing in the record of this case indicates that the offering of overseas dataphone-type services will significantly curtail the market for most other data services" (A-7). Far from imposing a "burden of proof" on the IRCs as they allege, the Commission merely searched the record and found no convincing evidence which colorably supported the IRCs' "viability" argument.

B. Raising Anticompetitive Issues Sua Sponte

We find it surprising that the IRCs argue that the Commission should raise anti-competitive questions *sua sponte*. The issues framed by the Notice of Inquiry adequately alerted the IRCs to the competitive questions and invited their views on these matters. To be sure, there are cases where courts have held that the Commission should raise and explore competitive questions not adequately addressed by the parties. These cases have involved ill-equipped non-profit, environmental and religious groups. *Scenic Hudson Preservation Conference* v. *FPC*, 354 F. 2d 608 (2d Cir. 1965), cert. denied sub nom. *Consolidated Edison Co.* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966); *Office of Communication of United Church of Christ* v. *FCC*, 425 F. 2d 543 (D.C. Cir. 1969). The Court may expect that companies with resources such as ITT, RCA and WUI need not rely on the *sua sponte* rule but can adequately raise the competitive issues on their own.

C. The Necessity of Evidentiary Hearing

The IRCs also argue that the Commission could not dispose of the competitive issues without a formal evidentiary hearing. Surprisingly, the IRCs apply a double standard to matters of proof. Their view seems to be that they may make generalized conclusory charges of anti-competitive effects whereupon the Commission is powerless to act favorably to the telephone companies without a formal evidentiary hearing. On the other hand, in their view, the Commission could have authorized the IRCs to provide their proposed services without any such hearing.

The evidentiary hearing sought by the IRCs would have produced an unmanageable record and long delay, "an excursion into details that too often obscures fundamental issues rather than clarifies them". *WBEN, Inc.* v. *U.S.*, 396 F.2d 601 (2d Cir. 1968) at 618, cert. denied 393 U.S. 914 (1968); *California Citizens Band Association* v. *FCC*, 375 F.2d 43 (9th Cir. 1967), cert. denied 389 U.S. 844 (1967).

The record in this proceeding reveals that the salient facts were explored adequately to "perceive, define and resolve the various strands of the public interest". *Citizen of Allegan County* v. *FPC*, 414 F.2d 1125, 1129 (D.C. Cir. 1969). The 444 pages in this record, in addition to other sources utilized by the Commission, and agency expertise brought to bear on the problems of this case were more than a sufficient basis for the policy conclusions reached.

Additionally, the IRCs have not timely requested a hearing. Nor have they shown that the Commission's procedures have not availed them of the opportunity to bring any relevant facts or evidence to the Commission's attention in this proceeding or that an oral hearing would have assisted the Commission in deciding the issues. The IRCs' "issues of fact" are largely conclusory arguments and speculation. This Court has found

that similar offers of proof did not warrant a hearing before the Commission or the District Court. *Radio Relay Corp.* v. *FCC*, 409 F. 2d at 330-31.[103]

D. Less Anti-competitive Alternatives

ITT also faults the Commission for failing to consider alternative methods of providing dataphone-type service, citing three possibilities: (1) determining to authorize the IRCs' proposed services while denying AT&T the authority to provide DATAPHONE transmission on MTS, (2) requiring a complete separation of AT&T's international services from its domestic services and (3) requiring AT&T to segregate its actual books and payrolls.[104] Needless to say, the first "alternative" was well within the scope of the issues specified by the Notice of Inquiry. The Commission considered and rejected it. The second alternative was mentioned by WUI in a reply pleading—somewhat as an afterthought—giving no substantial evidence to support the need or desirability of such a requirement. (A-375) The third alternative has not been mentioned in the record below and should not burden this Court. In any event, the Commission has plenary power to require carriers such as AT&T to maintain all records it deems necessary for the performance of its regulatory functions.[105]

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[103] See—also Gerard T. Uht, 35 F.C.C. 2d 140 (1972) at 147, 149; F.C.C. 2d 326 (1972) at 330-31.

[104] ITT Brief, pp. 39-40.

[105] Communications Act, Sections 218-20; 47 U.S.C.A. Sections 218-20.

Point IV

THE PETITIONS DO NOT ADDRESS AN "APPEALABLE" ISSUE

So far as relevant to this discussion, the January 19, 1976 Order made one significant finding:

> "Upon reviewing the record of this inquiry, we conclude that it is no longer appropriate to restrict the use of overseas message telephone service to voice-only. Customers with terminal equipment that is being used in conjunction with the domestic MTS network are prohibited from using that same equipment when making overseas calls, despite a need for such service. We find this restriction not in the public interest." (A-6)

This was the basic, ultimate finding in this case which the IRCs might properly have petitioned to review. Yet, strangely, the IRCs concede that the Commission was correct in reaching this conclusion.[106] They attack some of the rationale which led the Commission to this conclusion without attacking the conclusion itself.

More importantly, they attack decisions the Commission has not made. It is noteworthy that the January 19, 1976 Order did not grant the telephone companies the authority to do anything;[107] it merely directed the Chief of the Common Carrier

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[106] "[T]here was no dispute below—and none now—that subscribers to the domestic MTS should have the capability of placing and receiving data, facsimile and related record calls to overseas points." RCA Brief, p. 23. See also RCA Brief, p. 4; ITT Brief, p. 16.

[107] Accordingly, ITT's discussion of Delta Airlines, Inc. v. CAB, 442 F.2d 730 (D.C. Cir. 1970); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974) (ITT Brief, pp. 42-44); Ashbacker v. FCC, 326 US 327 (1945) (ITT Brief, pp. 45-46); and RCA's discussion of Saginaw Broadcasting Co. v. FCC, 96 F 2d 554 (D.C. Cir. 1938), cert. denied sub nom. Gross v. Saginaw Broadcasting Co., 305 U.S. 613 (1938) are irrelevant.

Bureau to accept any application the telephone companies might submit without prejudgment as to how it might act on that application. (A-6-7) The IRCs attack the decision below as if it had granted such an application.

In many respects, this case resembles *Radio Relay Corp.* v. *FCC*, 409 F. 2d 322 (2d Cir. 1969). In that proceeding, AT&T had petitioned the Commission to allocate previously unassigned higher frequencies to the wireline carriers (telephone companies) for radio paging service. Responding to the petition, the Commission issued a Notice of Inquiry proposing to assign one pair of frequencies to the wireline carriers and one pair to the non-wireline carriers. Radio Relay (a non-wireline carrier) made "generalized and speculative arguments"[108] strikingly parallel to those advanced in this proceeding:

> "(1) that because AT&T is in the related business of providing telephone service to so many, it would enjoy economies of scale in advertising its paging service (as, for example, by including a paging service advertisement in its phone bill mailings); (2) that because of its present ubiquitousness, it enjoys a degree of public acceptance that cannot be equaled by a small company competing with it; and (3) that because of its great resources, it may engage in predatory pricing." 409 F. 2d at 327.

The Commission concluded that, although there existed the possibility of some competitive advantage, Radio Relay had overstated the likelihood of injury to competitors. Like the IRCs in this proceeding, "Radio Relay challenge[d] the allocation of frequencies by the Commission . . . on the ground that the Commission failed to give adequate consideration to the alleged anti-competitive impact of its action", arguing that "the effect of the new Rule, which permits the entry of wireline carriers into the paging industry on a large scale, will be to destroy competition in that market." 409 F. 2d at 326.

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[108] Pocket Phone Broadcast Service v. FCC, No. 74-2040, et al (D.C. Cir. July 16, 1976) at p. 5, 7.

While the Court concluded that the Commission had given adequate consideration to the competitive questions raised by Radio Relay, it emphasized that the Commission had not authorized AT&T to do anything. It had merely allocated frequencies to wireline carriers, which must thereafter apply for authority to use those frequencies on a public interest showing:

> "In addition, it is most important that we recognize, as the Commission stressed, that the frequency allocations created by the Rule do not of themselves give any carrier the right to operate on these bands. They merely make the channels available to a prospective licensee upon a specific application and are allocated only after a determination by the Commission that permitting the licensee to operate in a specific geographic area will serve 'the public interest, convenience and necessity.'" 409 F. 2d at 327.

In many respects, this proceeding parallels the Commission's action in *Radio Relay*. It has determined that it will authorize the telephone companies to permit DATAPHONE transmission on MTS and it will allow the IRCs to expand their DATEL services, just as it assigned radio paging frequencies to wireline and non-wireline carriers. It will require applications for certificates of convenience and necessity as in *Radio Relay*. It rejected generalized arguments that AT&T's entry into the paging market would destroy competition (the "viability" argument), that AT&T enjoys advertising advantages (the "large sales force" argument), that AT&T enjoys the advantage of ubiquity (the "access to the hinterland" argument) and that AT&T might engage in predatory pricing (the "cross-subsidy" argument). The Commission has acted precisely in accord with the manner this Court found appropriate in *Radio Relay*.[109]

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[109] In this connection, the D.C. Circuit Court has recently found occasion to express agreement with this Court's views on review of the Commission's determination to authorize various telephone companies to use these newly allocated radio paging frequencies. Pocket Phone Broadcasting Service v. FCC, No. 74-2040 et al, (D.C. Cir. July 16, 1976).

The IRCs seem to argue that the only reasonable result that the Commission could have reached was that DATAPHONE use of MTS was in the public interest but that the IRCs should provide it. Yet, that result would have gone well beyond any result which might have been reasonably expected from the pleadings. It would indeed have called for a major restructure of the telecommunications industry as we know it today.

DATAPHONE transmission is merely a way telephone company customers use the telephone network. There is no way that the IRCs can provide DATAPHONE transmission on the MTS network unless they become an integral part of the telephone network. Their demands transcend mere interconnection. As their post-decisional filing shows, they now want the telephone companies to alter dialing codes and practices, the routing of calls, the switching mechanisms, the billing and accounting procedures, the operator practices—in short, the intelligent operation of the network—at great cost which the IRCs have made no discernible offer to bear—all as the price for permitting telephone customers to use the MTS network in a way that is privately beneficial and not publicly detrimental. No reasonable administrative agency could impose such a result on the telephone industry. Such an arrangement could offer no public benefit in terms of improved service or lower prices. The Commission charitably—and correctly—interpreted the IRCs' comments as asking something different. On the basis of the special public benefits they offered, the Commission found that the IRCs' specialized data services would serve the public interest.

The IRCs' Briefs reflect a fundamental misunderstanding of the Commission's decision. The Commission has decided that DATAPHONE transmission on the MTS network is privately beneficial without being publicly detrimental, that permitting such use would serve the public interest. The IRCs do not challenge that ultimate public interest finding, but instead attack decisions the Commission has not yet made. The Com-

mission has granted no authorization for DATAPHONE transmission on MTS, it has decided no interconnection issues. The IRCs accept the fundamental holding of the Commission and seek this Court's rulings on matters the expert administrative agency has not yet addressed.

The IRCs' petitions must fail because they have not appealed what the Commission has decided; rather, they appeal what the Commission has not decided. The Court should not be asked to review decisions the Commission has not made and may never make.

CONCLUSION

FOR THE REASONS SET FORTH HEREIN, THE IRCs' PETITIONS TO REVIEW SHOULD BE DENIED.

Respectfully submitted,

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Dated: September 10, 1976